

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 67

PAUL THEODORE CHEFF, PETITIONER,

vs.

ELMER J. SCHNACKENBERG, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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[fol. 1]

BEFORE FEDERAL TRADE COMMISSION

Commissioners:

John W. Gwynne, Chairman
 Robert T. Secrest
 Sigurd Anderson
 William C. Kern
 Edward T. Tait

Docket No. 6203

 In the Matter of

 HOLLAND FURNACE COMPANY, a corporation.

FINAL ORDER—Issued July 7, 1958

Respondent having filed an appeal from the initial decision of the hearing examiner in this proceeding; and the matter having been heard by the Commission on the whole record, including briefs and oral argument; and the Commission having rendered its decision denying respondent's appeal and adopting the initial decision as the decision of the Commission:

It Is Ordered that respondent Holland Furnace Company shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist contained in the initial decision.

By the Commission, Commissioner Kern not participating.

Robert M. Parrish, Secretary.

Seal

.

[fol. 2]

Order

It Is Ordered that respondent Holland Furnace Company, a corporation, and its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of furnaces, heating equipment, or parts therefor, do forthwith cease and desist from:

(1) Representing, directly or indirectly that any of its employees are inspectors or are employees or representatives of government agencies or of gas or utility companies.

(2) Representing, contrary to fact, that its salesmen or servicemen are heating engineers.

[fol. 3] (3) Representing that any furnace manufactured by a competitor is defective or not repairable, or that the continued use of such furnace will result in asphyxiation, carbon monoxide poisoning, fires, or other damage, or that the manufacturer of such furnace is out of business, or that parts of such furnace are unobtainable, unless such are the facts.

(4) Tearing down or dismantling any furnace without the permission of the owner.

(5) Representing that a furnace which has been dismantled cannot be reassembled and used without danger of asphyxiation, gas poisoning, fires, or other damage, or for any other reason, when such is not a fact.

(6) Requiring the owner of any furnace which has been dismantled by respondent's employees to sign a release absolving the respondent of liability for its employees' negligence, or of any other liability, before reassembling said furnace.

(7) Refusing to immediately reassemble, at the request of the owner, any furnace which has been dismantled by respondent's employees.

[fol. 4] (8) Misrepresenting in any manner the condition of any furnace which has been dismantled by respondent's employees.

James A. Purcell, Hearing Examiner.

October 22, 1957
Washington, D. C.

[fol. 5]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
No. 12451

HOLLAND FURNACE COMPANY, Petitioner,
vs.

FEDERAL TRADE COMMISSION, Respondent.

ORDER—August 5, 1959

On Petition to Review and Set Aside an Order
of the Federal Trade Commission

This case came on for consideration on respondent's motion for an order commanding petitioner Holland Furnace Company to obey and comply with the order to cease and desist entered against it by respondent Federal Trade Commission on July 7, 1958, unless and until said order shall be set aside upon review by this Court or by the Supreme Court of the United States, and upon petitioner's answer to said motion.

Upon consideration whereof it is the judgment of this Court that issuance of the order prayed for is necessary

to prevent injury to the public and to petitioner's competitors pendente lite; wherefore it is

Ordered that respondent's aforesaid motion be, and it hereby is, granted, and it is

Ordered that petitioner be, and it hereby is, commanded forthwith to obey and comply with the order to cease and desist entered against it on July 7, 1958, in a proceeding before respondent entitled "In the Matter of Holland Furnace Company, a corporation, Docket No. 6203," until and unless said order to cease and desist shall be set aside upon review by this Court or by the Supreme Court of the United States, or until further order of this Court.

Elmer J. Schnackenberg, Judge.

John S. Hastings, Judge.

Fred L. Wham, Judge.

[fol. 6]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

13671

In Re

HOLLAND FURNACE COMPANY.

Present:

Hon. Elmer J. Schnackenberg, Circuit Judge

Hon. Roger J. Kiley, Circuit Judge

Hon. Luther M. Swygert, Circuit Judge

ORDER TO SHOW CAUSE—April 26, 1963

Upon the verified petition of the attorneys appointed herein to prosecute on behalf of the Court, requesting this Court to institute herein prosecutions of Paul Theodore

Cheff, Katherine Nyestrom Cheff, Edgar P. Landwehr, John D. Ames, Ralph Boalt, Robert H. Trenkamp, George Spatta, Alvin W. Klomparens, Richard J. Koerner, Henry Weyenberg, and Jay A. Wabeke, for criminal contempts of this Court, it is

Ordered that each of the aforementioned individuals, on or before the 25 day of June, 1963, file a verified answer to the said petition for institution of prosecutions for criminal contempts and for adjudication in and punishment for such criminal contempts filed on the 19 day of April, 1963, by the said attorneys appointed to prosecute on behalf of the Court, each of said answers to show cause, if any there be, why the individual filing the same should not be adjudged in criminal contempt of this Court, and punished [fol. 7] for such criminal contempt, by reason of having knowingly, wilfully and intentionally caused, and aided and abetted in causing, respondent Holland Furnace Company to violate and disobey, and fail and refuse to comply with, an order of this Court entered on August 5, 1959, in Cause No. 12451, entitled on the records of this Court "Holland Furnace Company, Petitioner, v. Federal Trade Commission, Respondent," all as appears from the said petition of the attorneys appointed to prosecute on behalf of the Court; and it is

Further Ordered that a copy of this Order to Show Cause, together with a copy of the said petition and all attachments thereto, a copy of the order of this Court appointing the said attorneys to prosecute herein on behalf of the Court, a copy of the prosecution's motion herein for a finding of guilty against respondent Holland Furnace Company, and a copy of the prosecution's memorandum brief in support of said motion, be served by a United States Marshal upon each of the aforementioned individuals on or before the 26 day of May, 1963, and that a return of such service be filed with the Clerk of this Court.

[fol. 8]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

13,671

In ReHOLLAND FURNACE COMPANY.

Present:

Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Roger J. Kiley, Circuit Judge
Hon. Luther M. Swygert, Circuit Judge

ORDER APPOINTING ATTORNEYS—April 26, 1963

The attorneys appointed herein to prosecute respondent Holland Furnace Company for criminal contempt of this Court having filed a petition requesting the Court to institute additional criminal contempt prosecutions of Paul Theodore Cheff, Katherine Nyestrom Cheff, Edgar P. Landwehr, John D. Ames, Ralph Boalt, Robert H. Trenkamp, George Spatta, Alvin W. Klomparens, Richard J. Koerner, Henry Weyenberg, and Jay A. Wabeke, by reason of their having knowingly, wilfully and intentionally caused, and aided and abetted in causing, respondent Holland Furnace Company to violate and disobey, and fail and refuse to comply with, an order of this Court entered on August 5, 1959, in Cause No. 12451, entitled on the records [fol. 9] of this Court, "Holland Furnace Company, Petitioner, v. Federal Trade Commission, Respondent," and the Court having considered the request, it is

Ordered that J. B. Truly, Assistant General Counsel, and E. K. Elkins and Miles J. Brown, Attorneys of the Federal Trade Commission, the attorneys heretofore ap-

pointed to prosecute on behalf of this Court the respondent Holland Furnace Company for criminal contempt of this Court, be, and they hereby are, appointed also to prosecute on behalf of this Court the aforementioned individuals for criminal contempts of this Court.

[fol. 10]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 13671

In Re

HOLLAND FURNACE COMPANY.

PETITION FOR INSTITUTION HEREIN OF PROSECUTIONS OF
ADDITIONAL RESPONDENTS FOR CRIMINAL CONTEMPTS
AND FOR ADJUDICATION IN AND PUNISHMENT FOR
SUCH CRIMINAL CONTEMPTS

To the Honorable, the Judges of the United States Court
of Appeals for the Seventh Circuit:

Come Now the attorneys appointed herein to prosecute on behalf of the Court, and respectfully petition the Court to institute, pursuant to Section 401(3) of Title 18 of the United States Code, and in conformity with Rule 42(b) of the Rules of Criminal Procedure for the United States District Courts, prosecutions of Paul Theodore Cheff, Katherine Nyestrom (Mrs. Paul Theodore) Cheff, Edgar P. Landwehr, John D. Ames, Ralph Boalt, Robert H. Trenkamp, George Spatta, Alvin W. Klomparens, Richard J. Koerner, Henry Weyenberg, and Jay A. Wabeke, for criminal contempts of this Court, and to adjudge them to be in and punish them for such criminal contempts, by reason of their jointly and severally having knowingly, wilfully and intentionally caused, and aided and abetted in

[fol. 11] causing, the Holland Furnace Company, hereinafter called "respondent," to violate, disobey, and fail and refuse to comply with, an order of this Court entered on August 5, 1959; and in support thereof the attorneys appointed to prosecute on behalf of the Court respectfully show the Court the following facts:

.

[fol. 12] G. Paul Theodore Cheff, Katherine Nyestrom Cheff, Edgar P. Landwehr, John D. Ames, Ralph Boalt, Robert H. Trenkamp, George Spatta, Alvin W. Klomparens, Richard J. Koerner, Henry Weyenberg, and Jay A. Wabeke, acting jointly and severally, have knowingly, wilfully and intentionally caused, and aided and abetted in causing, respondent's aforesaid violations of the said order of this Court, and respondent's aforesaid commission thereby of criminal contempts of this Court and of its lawful authority, in that:

(1) they, and each of them, had full notice and knowledge of the long-established use by respondent, and by its agents, representatives and employees in its behalf, of the methods, acts, and practices prohibited by the said order of this court, and—

(2) they, and each of them, in their several capacities as officials, officers, directors, and controlling stockholders of respondent, had, jointly and severally, and knew that they had, the authority and the power to take effective action to stop and to prevent henceforth such use, and—

[fol. 13] (3) they, and each of them, had full notice and knowledge that such use would continue unless effective action to stop such use and to prevent it thenceforth was taken by them in their several capacities as officials, officers, directors, and controlling stockholders of respondent, despite which—

(4) they, and each of them, (a) took no action reasonably effective to, or reasonably designed or intended to,

stop such use and to prevent it thenceforth, but instead (b) made no change in the sales methods and policies of respondent which had conduced to such use before the said order was issued and which continued to conduce to said use thereafter, (c) retained, defended, awarded, and promoted agents, representatives and employees of respondent who were known to them to have used the forbidden methods, acts and practices, and (d) thereby, and by other additional means and actions, encouraged, condoned and fostered such continued use by respondent, and by its agents, representatives and employees in its behalf, of the methods, acts, and practices prohibited by the said order of this Court.

H. Paul Theodore Cheff, Katherine Nyestrom Cheff, Edgar P. Landwehr, John D. Ames, Ralph Boalt, Robert H. Trenkamp, George Spatta, Henry Weyenberg, and Jay A. Wabeke, and each of them, in knowingly, wilfully and intentionally causing, and aiding and abetting in causing, [fol. 14] respondent to violate and disobey, and to fail and refuse to comply with, the said order of this Court, during the period from August 5, 1959, until December 31, 1961, and thereby to commit criminal contempt of this Court and of its lawful authority, have jointly and severally, thereby, and by all and each of respondent's aforesaid violations and contempts committed during said period, committed criminal contempt of this Court and of its lawful authority.

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[fol. 15]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
No. 13671

In Re
HOLLAND FURNACE COMPANY.

VERIFIED ANSWER OF PAUL THEODORE CHEFF
TO ORDER TO SHOW CAUSE

State of Michigan
County of Ottawa

Paul Theodore Cheff, upon oath deposes and states that he did not knowingly, willfully or intentionally, cause, and/or aid or abet in causing Holland Furnace Company to violate and disobey, and fail and refuse to comply with, an order of the United States Court of Appeals for the Seventh Circuit entered on August 5, 1959, in Cause No. 12451, entitled on the records of said Court "Holland Furnace Company, Petitioner, v. Federal Trade Commission, Respondent," as set forth in the petition for institution of prosecutions for criminal contempts filed with said Court in the instant cause on April 19, 1963.

Your respondent hereby requests a complete trial on the said issues.

Paul Theodore Cheff

Subscribed and sworn to before me this 23rd day of August, 1963.

Esther Bareman, Notary Public, Ottawa County, Mich.,
My Commission Expires 9-28-65.

Certificate of Service (omitted in printing).

[fol. 16]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Petition for Criminal Contempt
No. 3671

In Re: HOLLAND FURNACE COMPANY, et al.

Before:

Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Roger J. Kiley, Circuit Judge
Hon. Luther M. Swygert, Circuit Judge

ORDER—October 9, 1963

By agreement of counsel for the court and counsel for Respondents Paul Theodore Cheff, Katherine Nyestrom Cheff, Edgar P. Landwehr and Alvin W. Klomprens.

It Is Ordered that said Respondents shall file with this court, on or before November 8, 1963, an election of trial by jury or a waiver of a jury trial.

[fol. 17]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
No. 13671

In Re
HOLLAND FURNACE COMPANY.

DEMAND FOR JURY TRIAL—Filed November 8, 1963

Now Come the Respondents, Paul Theodore Cheff, Katherine Nyestrom Cheff and Edgar P. Landwehr. by their

attorneys, Hyman B. Raskin and Robert J. Downing, and at this time request and demand a jury trial on the issues involved in the instant matter.

Paul Theodore Cheff, Katherine Nyestrom Cheff
and Edgar P. Landwehr, By Hyman B. Raskin,
Robert J. Downing.

Certificate of Service (omitted in printing).

[Stamped—U.S.C.A.—7th Circuit—Filed May 26 1964—
Nunc pro tunc as of Nov. 8, 1963—Kenneth J. Carrick,
Clerk]

[File endorsement omitted]

[fol. 18]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 13671

In Re

HOLLAND FURNACE COMPANY, et al.
(PAUL THEODORE CHEFF)

PROSECUTION'S REPLY TO ANSWER OF RESPONDENT PAUL
THEODORE CHEFF—Filed December 7, 1963

Come Now the attorneys appointed to prosecute on behalf of the Court, and by way of Reply to the Answer filed herein on August 26, 1963, by respondent Paul Theodore Cheff, respectfully advise the Court that said respondent has by said Answer denied each and all of the allegations of the petition filed herein by Court-appointed counsel on April 19, 1963, and otherwise has reserved his defense, and that in the view of Court-appointed counsel the evidence

[File endorsement omitted]

indicated, in said petition and in other documents herein, to be available with respect to this respondent is sufficient in fact and in law to establish that he has committed a criminal contempt of this Court as charged in said petition.

Wherefore the attorneys appointed to prosecute on behalf of the Court pray that the Court (1) now determine that respondent Paul Theodore Cheff, having been afforded [fol. 19] the opportunity to make preliminary showing why he should not be adjudged in criminal contempt of this Court as charged in the petition filed herein on April 19, 1963, by Court-appointed counsel, has not so shown, and (2) that the Court, after such further proceedings as it determines to be just and appropriate in the circumstances, adjudge respondent Paul Theodore Cheff in criminal contempt of this Court, and punish him for such criminal contempt in such manner as this Court deems just and proper.

Respectfully submitted.

J. B. Truly, E. K. Elkins, Miles J. Brown, Attorneys
appointed to prosecute on behalf of the Court.

Dated: December 5, 1963.

[fol. 20] *Duly sworn to by E. K. Elkins, jurat omitted in printing.*

[fol. 21]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Petition for Criminal Contempt
No. 13671

In Re: HOLLAND FURNACE COMPANY, et al.

Before:

Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Roger J. Kiley, Circuit Judge
Hon. Luther M. Swygert, Circuit Judge

ORDER DENYING DEMAND FOR JURY TRIAL, ETC.
—May 27, 1964

The court has considered the demand for trial by jury on the issues involved herein filed on May 26, 1964, *nunc pro tunc* as of November 8, 1963, by respondents Paul Theodore Cheff, Katherine Nyestrom Cheff and Edgar P. Landwehr, as well as the waiver of jury trial filed by respondent Alvin W. Klomparens on May 26, 1964, *nunc pro tunc* as of November 8, 1963, and the court determines that none of said respondents is entitled to a trial by jury on the matters involved in the proceeding at bar, and therefore, It Is Ordered that said demand for jury trial be denied and said waiver of jury trial be stricken.

[fol. 22]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
SEPTEMBER TERM, 1964—JANUARY SESSION, 1965
No. 13671

In Re: HOLLAND FURNACE COMPANY, et al.

JANUARY 27, 1965

Before Schnackenberg, Kiley and Swygert, Circuit Judges.

This criminal contempt proceeding was begun on petition of the Federal Trade Commission alleging that respondents "knowingly, wilfully and intentionally" violated and disobeyed an order of this court of August 5, 1959, directed against respondents, by failing and refusing to comply with said order. The Rules to Show Cause issued. Issues were joined by respondents' answers, and this court, without a jury,¹ heard evidence and arguments on the issues.

In the August 5, 1959 order of this court, respondents were "commanded forthwith to obey and comply" with an FTC order, entered July 7, 1958, "until and unless," the Commission order "shall be set aside upon review by this court or the United States Supreme Court, or until further order of this court."

[fol. 23] The Commission order of July 7, 1958 was entered at the conclusion of hearings of proceedings against Holland Furnace Company charging unfair methods of competition and deceptive acts and practices in commerce.

¹ Following the Supreme Court's decision in *United States v. Barnett*, 376 U.S. 681 (1964), this court denied motions of certain respondents for jury trial.

The order directed "respondent Holland Furnace Company, a corporation, and its officers, agents, representatives, and employees, directly or through any corporate or other device" in selling or distributing Holland products or services, to cease and desist from:

- (1) Representing, directly or indirectly, that any of its employees are inspectors or are employees or representatives of government agencies or of gas or utility companies.
- (2) Representing, contrary to fact, that its salesmen or servicemen are heating engineers.
- (3) Representing that any furnace manufactured by a competitor is defective or not repairable or that the continued use of such furnace will result in asphyxiation, carbon monoxide poisoning, fires, or other damage, or for any other reason, when such is not a fact.
- (4) Tearing down or dismantling any furnace without the permission of the owner.
- (5) Representing that a furnace which has been dismantled cannot be reassembled and used without danger of asphyxiation, gas poisoning, fires, or other damage, or for any other reason, when such is not a fact.
- (6) Requiring the owner of any furnace which has been dismantled by respondent's employees to sign a release absolving the respondent of liability for its employees' negligence, or of any other liability, before reassembling said furnace.
- (7) Refusing to immediately reassemble, at the request of the owner, any furnace which has been dismantled by respondent's employees.
- (8) Misrepresenting in any manner the condition of any furnace which has been dismantled by respondent's employees.

The Commission's order, as enforced by this court's August 5, 1959 order, remained in full force and effect [fol. 24] and was made permanent by this court's affirmance of the Commission's order on November 7, 1961. *Holland Furnace Co. v. FTC*, 295 F.2d 302 (1961). The contempt charges before us cover the period from August 5, 1959 to the entry of the final judgment by this court.

Certain respondents made requests for findings of facts "specially," under Rule 23(c), and for "special findings."² The court, in lieu of making the "special findings" requested, makes its own findings of fact and conclusions of law on the record and transcript of evidence as follows:

I.

Holland Furnace Company is a Delaware corporation with principal offices in Holland, Michigan. From April, 1946 to May, 1962 respondent Paul T. Cheff was Holland's president and chairman of its board of directors, owning 6,004 shares of stock. His wife, Katherine Nystrom Cheff, respondent, was a director from March, 1935 to May, 1962, and owned 43,004 shares of stock. Her nephew, respondent Edgar P. Landwehr, was a director from April, 1945 to May, 1962, and owner of 24,410 shares of Holland stock. Respondents John D. Ames, Ralph Boalt, Robert H. Trenkamp, and George Spatta were directors, respectively, from April, 1954 to June, 1961, from April, 1953 to May, 1962, from April, 1953 to July, 1962, and from April, 1951 to February, 1962. Ames owned 200 shares, Boalt 200 shares, Spatta 500-1000 shares, and Trenkamp 200 shares of Holland stock.

² "That, if any or all of the above-named respondents is held to have been in contempt of this Court's order of August 5, 1959, this Court make special findings of fact as to the conduct, events, and circumstances upon which such contempt conviction is based, including findings as to the conduct, events, and circumstances underlying any finding of a violation of that order by any other respondent in this proceeding, including the Holland Furnace Company, if such a violation is an element in the finding that any or all of the above-named respondents has been in contempt."

Respondent Alvin W. Klomprens was vice president and sales manager from April, 1956 to March, 1960. Richard J. Koerner, respondent, succeeded Klomprens as sales manager, from April, 1960 to April, 1961, and was also vice president from April, 1961 to June, 1962. Respondent Henry Weyenberg was production manager and chief engineer of Holland from April, 1959 to April, [fol. 25] 1960 and vice president after 1960. Jay A. Wabeke, respondent, was manager of Holland's Product Service Department from the time of its creation in September, 1959.

The parties to this proceeding stipulated that 164 "attachments" to the contempt petitions, 132 attachments to Holland's answer, and two attachments to the Commission's reply to Holland's answer "may be" received in evidence and be considered by this court as if affiants were witnesses; and that this court "may resolve" any conflicts in the affidavits and determine credibility of affiants. No concessions were made in the stipulation as to truth or falsity of the statements therein and as to whether respondents had power or authority over the "facts" stated in the affidavits or any responsibility for any alleged violations asserted therein. The parties waived right of confrontation of witnesses and right of cross-examination.

In its answer to the petition for contempt, Holland Furnace Company admits that the conduct of its employees in fifteen transactions, involving twenty-five separate violations, involving the following customers of Holland, violated the August 5, 1959 order of this court:

ALLEN, Atlanta, Georgia
 BIBEAU, Spokane, Washington
 CLAYMANN, Seattle, Washington
 CONDON, Denver, Colorado
 EHRLICH, Albert Lea, Minnesota
 EWING, Peabody, Massachusetts
 GRUMLING, Mansfield, Ohio
 HENDRICKSON, Albert Lea, Minnesota

HOOKER, San Francisco, California
NIELSEN, Chicago, Illinois
SHELLABARGER, Akron, Ohio
STEWART, Seattle, Washington
TAYLOR, Cuyahoga Falls, Ohio
THOMPSON, Cuyahoga Falls, Ohio
WINK, Spokane, Washington

In addition, the testimony shows that the Attorney General of Minnesota brought an action against Holland for unfair and deceptive practices by its employees, and [fol. 26] several attorneys general in other states contemplated or threatened similar action. This testimony and the fifteen admitted instances of twenty-five violations by respondent Holland Furnace Company of this court's order of August 5, 1959 represent, exemplify and illustrate the contempt of this court's order during the entire period covered by petition, throughout the entire territory in which respondent Holland Furnace Company operates, according to a regular and usual method by which the corporate respondent has in that period and in that territory sold and offered for sale its furnaces, heating equipment, and parts therefor.

We are convinced beyond a reasonable doubt, on the basis of the entire record, that Holland Furnace Company, acting through certain of its officers, agents, representatives and employees, through a "regular and usual" sales practice of its employees in commerce has "knowingly, wilfully and intentionally" violated and disobeyed in one or more instances each of the prohibitions of the August 5, 1959 order of this court; and accordingly we find the Holland Furnace Company guilty of criminal contempt of this court.

II.

We are convinced beyond a reasonable doubt, on the evidence in this case, that respondent Paul T. Cheff is guilty of "knowingly, wilfully and intentionally" causing

and aiding and abetting in causing, in one or more instances, violations by Holland Furnace Company of each of the eight prohibitions in the August 5, 1959 order of this court.

There is abundant evidence from which we find that Cheff was the dominant head of Holland Furnace Company in the period during which the Holland sales practices subject of the Commission's cease and desist order occurred; that he was the dominant head of Holland when the Commission's hearings were conducted, when the cease and desist order issued, when the August 5, 1959 order of this court was entered, and thereafter until May, 1962; that he was well aware of the condemned sales practices and of the prohibitions in the order of this court; that following the entry of the order Cheff made no bona fide attempt to comply or achieve compliance with the order; [fol. 27] that on the contrary he pursued a course of conduct designed to construct an apparent compliance with the order and to devise a defense against charges of violation; that he established the Product Service Department, not to "discipline" the Holland organization or bring about compliance with this court's order, but as a facade behind which to continue the condemned sales practices; that his appointment of Wabeke to head the department was in furtherance of Cheff's plan to make no substantial change in Holland's sales practices since he could not help but know that Wabeke would not be effective in investigating complaints and disciplining the sales force; that Cheff had no intention of permitting Wabeke to be effective; that he frustrated Wabeke's sincere attempts to accomplish compliance with this court's order by telling Wabeke he had complete authority to discharge salesmen while telling others that Wabeke could only "recommend" discharge; that in the Holland Furnace Company house organ, the "Firepot," Cheff complained of recommendations to discharge salesmen, and that with the knowledge and approval of Cheff, salesmen whom Wabeke had recommended discharging

were praised in the publication; that Cheff's occasional meetings with division sales managers, without Wabeke, at which he read from extensive notes to the eight or so in attendance, were apparent rather than real attempts to comply with this court's order; that instead of traveling to meet with Better Business Bureaus in various parts of the country to adjust serious complaints, he sent Wabeke and Weyenberg, neither of whom was suited to the purpose; that Cheff did not himself go out into the field to meet with branch managers or salesmen, or with Wabeke, to induce compliance with the order, and did not take pains to see that his entire sales organization understood the seriousness of compliance, as did his successors in management by bringing 2,000 salesmen to Holland, Michigan; that his bulletin, "The policy we work by," purporting to bring about compliance with the court's order, carefully avoided the word "discharge" and purposely avoided mentioning restraint on unauthorized dismantling of furnaces—that the bulletin was ineffective to influence radical changes in Holland's sales policy, even if, and there is doubt of this, it reached the salesmen; and that Cheff's design in his relations with directors, employees or customers was to in-[fol. 28] sulate Holland and himself from compliance with this court's order and from guilt for non-compliance.

Cheff made no substantial change after August 5, 1959 in Holland's sales practices or in the fundamental structure underlying the practices. Holland's policy remained the same: working on the replacement of furnaces instead of the original furnace market, operating on a straight commission basis with salesmen, and higher prices for Holland furnaces than its competitors, and realizing profit only on sales of furnaces, not on repairs or cleaning. The loose sales hierarchy, with tenuous relationship between Cheff and the sales managers, between them and the division sales managers, and between them and the branch managers, remained as it had been. Cheff remained aloof from the sales managers, division managers and salesmen. All this contributed to a condition which lent itself to undis-

ciplined sales practices. Moreover, Cheff's unbending attitude toward the Commission's cease and desist order and his confidence in eventually setting it aside were an obstruction to change and to compliance with the court's order.

III.

Alvin W. Klomparens was employed by Holland in 1937, and served as sales manager and vice president from April, 1956 until April, 1960. He was succeeded by Richard J. Koerner, who was employed in 1948, and was a division sales manager when he was appointed by Cheff as sales manager to succeed Klomparens. After Koerner served in that position for one year, Cheff appointed him also a vice president.

We are convinced beyond a reasonable doubt, by the evidence in this record, that respondents Klomparens and Koerner aided and abetted in causing the proven violations of this court's order of August 5, 1959 during the respective periods of time each served as sales manager.

Both of these respondents were well aware of Holland's sales practices, of the proceedings before the Federal Trade Commission, and of the August 5, 1959 order of this court. The oral and documentary proof has convinced us beyond a reasonable doubt that each of these respondents willingly lent himself to Cheff's program of maintaining the sales [fol. 29] practices which were prohibited by this court's order. They not only aided and abetted Cheff's design by disregarding what obligation the office of sales manager imposed on them in view of the order of this court, but they aided and abetted the violation of that order in an affirmative way. Klomparens edited the "Firepot," and requested, wrote and approved articles directed at the sales force with the intention of neutralizing any attempt by Wabeke's Product Service Department to bring about compliance. And Koerner, after his appointment as sales manager, wrote division sales managers that only he and Cheff had power to discharge and that sales managers must fight

"obstacles" such as the Product Service Department and the Better Business Bureaus.

IV.

We find that the evidence does not prove beyond a reasonable doubt that Henry Weyenberg and Jay A. Wabeke caused or aided and abetted in causing respondent Holland Furnace Company to violate and disobey, and fail and refuse to comply with, the order of this court. They have not committed criminal contempts of this court and of its lawful authority.

During the period covered by the contempt citation herein, respondents Weyenberg and Wabeke had no real or effective power or authority over or responsibility for the sales operations of the company or the actions of its agents, representatives, and employees in connection with the offering for sale, sale, and distribution of its products and services, and no real or effective power or authority over or responsibility for the selection, employment, promotion, demotion, transfer, removal, or discharge of those agents, representatives and employees.

V.

We find the record shows that directors John D. Ames, Ralph Boalt, George Spatta, and Robert H. Trenkamp were grossly negligent in failing to perform fully their duties as directors of Holland Furnace Company and in relying upon Cheff's assurances that this court's order was not being violated or disobeyed. The gross negligence in this case does not, however, constitute criminal contempt. [fol. 30] Trenkamp's position, as attorney for Holland during and after the proceedings before the Commission, imposed upon him a special responsibility, in addition to that which he had as director. It is questionable, to say the least, whether this professional responsibility was discharged by Trenkamp in a manner that reflected fully an awareness of this added responsibility.

There is no justification upon testimony in the hearing and the facts stated in their answers to the petition, which we are taking as true, to infer that these respondents did anything affirmatively or positively to cause or to aid and abet in causing violations of this court's order. We have a reasonable doubt that they knowingly, wilfully and intentionally caused or aided and abetted in causing respondent Holland Furnace Company to violate the order. We find that the evidence does not prove beyond a reasonable doubt that directors Ames, Boalt, Spatta, and Trenkamp are guilty of the criminal contempt charged against them. The rule to show cause as to them is discharged.

What we have said in the next preceding paragraph about the above-named four directors applies equally to Katherine Nystrom Cheff and Edgar P. Landwehr, who filed no answers. The record is virtually silent as to them, and justifies only the inference that they were grossly negligent in their duties. It does not justify an inference that they knowingly, wilfully and intentionally caused or aided and abetted in causing the violation of this court's order. The rule to show cause as to them is discharged.

[fol. 31]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Before

Hon. Elmer J. Schnackenberg, Circuit Judge

Hon. Roger J. Kiley, Circuit Judge

Hon. Luther M. Swygert, Circuit Judge

No. 13671

In re: HOLLAND FURNACE COMPANY

Petition for Criminal Contempt.

JUDGMENT ORDER—January 27, 1965

This cause having come on to be heard in open court on the petition of the Federal Trade Commission, filed March 19, 1962, and the order to show cause as prayed in said petition, which order was issued March 19, 1962, and which order directed Holland Furnace Company to answer said petition and to show cause, if any there be, why it should not be adjudged in criminal contempt of this court, and punished for such criminal contempt, by reason of having knowingly, wilfully and intentionally violated and disobeyed, and failed and refused to comply with an order of this court entered on August 5, 1959, in Cause No. 12451, entitled on the records of this court "Holland Furnace Company, Petitioner v. Federal Trade Commission, Respondent," all as appear from the said petition of the Federal [fol. 32] Trade Commission, and the answer of Holland Furnace Company filed August 15, 1962, and its further answer filed November 27, 1962, a reply to said answer and further answer filed April 18, 1963 by the prosecutors ap-

[File endorsement omitted]

pointed by this court, together with said prosecutors' motion for a finding that Holland Furnace Company has committed criminal contempt of this court and that the court adjudge punishment accordingly, as well as the answer of Holland filed September 30, 1963; and

This cause also having been heard on the verified petition filed April 19, 1963 by the attorneys appointed to prosecute on behalf of the court, which petition named as additional respondents herein Paul Theodore Cheff, Katherine Nystrom Cheff, Edgar P. Landwehr, John D. Ames, Ralph Boalt, Robert H. Trenkamp, George Spatta, Alvin W. Klomprens, Richard J. Koerner, Henry Weyenberg and Jay A. Wabeke; and the answer of said additional respondents filed herein, including the amendments to answer and a supplemental answer, the prosecution's replies to all of said respondents' answers, and the court having reserved its ruling on the motions of respondents Wabeke and Weyenberg that the order to show cause be discharged as to them; and

The court having heard and considered the evidence offered in open court in support of the petitions and the evidence offered by various respondents, and the cause having been submitted to the court thereon, and the court having considered the motions of the various respondents for a discharge of the rule to show cause and having considered [fol. 33] the various briefs and memoranda of law filed by counsel representing all respondents and said prosecutor, and the court having this day filed a written opinion which makes findings of fact in this case;

The court finds that, as to the respondents Wabeke and Weyenberg, it has not been proved by evidence beyond a reasonable doubt that they knowingly, wilfully and intentionally caused, or aided and abetted in causing respondent Holland Furnace Company to violate, disobey and fail and refuse to comply with said order of this court entered on August 5, 1959.

As to respondent Katherine Nystrom Cheff, the court finds that it has not been proved by evidence beyond a reasonable doubt that she knowingly, wilfully and intentionally caused, or aided and abetted in causing respondent Holland Furnace Company to violate, disobey and fail and refuse to comply with said order of this court entered on August 5, 1959.

As to the respondents Edgar P. Landwehr, John D. Ames, Ralph Boalt, Robert H. Trenkamp and George Spatta, the court finds that it has not been proved by evidence beyond a reasonable doubt that they knowingly, wilfully and intentionally caused, or aided and abetted in causing respondent Holland Furnace Company to violate and disobey, and fail and refuse to comply with said order of this court entered on August 5, 1959.

It Is Therefore Ordered that said rule to show cause is hereby discharged as to said Henry Weyenberg, Jay A. [fol. 34] Wabeke, Katherine Nystrom Cheff, Edgar P. Landwehr, John D. Ames, Ralph Boalt, Robert H. Trenkamp and George Spatta.

And having considered the evidence offered in open court and the admissions made in the answer of respondent Holland Furnace Company, the court finds that it has been proved beyond a reasonable doubt that said respondent knowingly, wilfully and intentionally violated, disobeyed, failed and refused to comply with said order of this court entered on August 5, 1959; that, as to respondents Paul Theodore Sheff, Alvin W. Klomprens and Richard J. Koerner, the court finds that it has been proved beyond a reasonable doubt that they and each of them knowingly, wilfully and intentionally caused, and aided and abetted in causing, the aforesaid violations by Holland Furnace Company of the said order of this court, entered on August 5, 1959; and said Company and Cheff, Klomprens and Koerner have thereby committed criminal contempt of this court and of its lawful authority.

It Is, Therefore, Ordered that said Holland Furnace Company, Paul Theodore Cheff, Alvin W. Klomprens and

Richard J. Koerner be and they are hereby each adjudged in criminal contempt of this court, by reason whereof the court imposes a fine on said Holland Furnace Company of One Hundred Thousand Dollars and costs to be taxed by the clerk of this court, payable forthwith, and that execution issue therefor; and also by reason whereof the court sentences Paul Theodore Cheff to imprisonment for a period of six months and he is ordered committed to the [fol. 35] custody of the Attorney General of the United States or his authorized representative for imprisonment for said period of six months; and also by reason whereof the court sentences the respondents Alvin W. Klomprens and Richard J. Koerner each to pay a fine of Five Hundred Dollars forthwith, and in default of payment of said fine each is to stand committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment until said fine be paid or until otherwise discharged as provided by law, said fines and costs to be payable to the clerk of this court, either in United States currency or a bank's certified check.

It Is Ordered that the clerk deliver a certified copy of this judgment order and commitment to the United States marshal and that the said copy serve as the commitment of those respondents subject to committal as aforesaid.

[fol. 36]

SUPREME COURT OF THE UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR
WRIT OF CERTIORARI—February 15, 1965

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled case be, and the same is hereby, extended to and including April 12th, 1965.

Tom Clark, Associate Justice of the Supreme Court
of the United States

Dated this 15th day of February, 1965.

[fol. 37]

SUPREME COURT OF THE UNITED STATES

No. 67—October Term, 1965

PAUL THEODORE CHEFF, Petitioner,

v.

ELMER J. SCHNACKENBERG, et al.

ORDER ALLOWING CERTIORARI—November 15, 1965

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted limited to Question 3 presented by the petition which reads as follows:

"3. Whether, after denial of a demand for a jury trial, the sentence of imprisonment of six months imposed upon petitioner is constitutionally permissible under Article III and the Sixth Amendment."

The case is placed on the summary calendar and set for argument immediately following No. 442.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

